U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10813949

Date: MAR. 12, 2021

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner, a historical architect, seeks second preference immigrant classification as a member of the professions holding an advanced degree, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Nebraska Service Center denied the petition and a subsequent motion, concluding that the Petitioner qualified for classification as a member of the professions holding an advanced degree but that she had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

We dismissed the subsequent appeal, concluding that the Petitioner has not sufficiently demonstrated the national importance of her proposed endeavor under the first prong of the analytical framework described in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). In our decision, we declined to comment on whether the record demonstrates eligibility under the second and third prongs outlined in *Dhanasar*. The matter is before us again on a combined motion to reopen and a motion to reconsider.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon review, we will dismiss the combined motion.

I. LAW

A motion to reopen is based on documentary evidence of *new facts*, and a motion to reconsider is based on an *incorrect application of law or policy*. The requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2), and the requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

We concluded on appeal that the documentation in the record does not establish the national importance of the Petitioner's proposed endeavor, as required by the first *Dhanasar* prong. We will address the merits of the motion to reopen and the motion to reconsider separately.

First, our decision summarized the proposed endeavor as follows:

> The Petitioner indicated that she intends to continue her work aimed at restoring and preserving government and religious buildings. She stated that her proposed work involves "serving as a historical consultant on building remodeling" for the [redacted]. The Petitioner further explained that she plans to advise [redacted] on [redacted] cultural elements for a number of their community centers including: [redacted] Education Center, Community Service Center [redacted] Faith Center and Museum, and more." The record includes a letter from [redacted], president of [redacted] requesting the Petitioner's services "to provide concept design consultation for remodeling of [redacted] buildings, with reference to [redacted] cultural elements, including coordination of implementation, liaising with suppliers and contractors to ensure the quality of the end result; and also custom design of [redacted] exhibition displays."[1] [redacted] further noted that [redacted] "owns five commercial buildings with 75,000 square feet area, located in [redacted] metropolitan area."
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> In addition, the Petitioner provided a letter from [redacted] a senior archeologist with the [redacted]'s Heritage and Historic Preservation Department, stating that the Petitioner and a colleague were under consideration for a project involving "the [redacted] that was built around 1935." [redacted] requested their assistance with "documentation of the three existing historical buildings, particularly building no. 302, which has architectural decorative works which we would like to preserve and document before demolishing it." She also sought "recommendations for reusing those materials which will be available after demolishing and reusing them for the construction of our new building."

A. Motion to Reopen

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). The regulation at 8 C.F.R. § 103.5(a)(2) does not define what constitutes a "new" fact, nor does it mirror the Board of Immigration Appeals' (the Board) definition of "new" at 8 C.F.R. § 1003.2(c)(1) (stating that a motion to reopen will not be granted unless the evidence "was not available and could not have been discovered or presented at the former hearing"). Unlike the Board regulation, we do not require the evidence of a "new fact" to have been previously unavailable or undiscoverable. Instead, we interpret "new facts" to mean facts that are relevant to the issue(s) raised

[1] As the Petitioner is applying for a waiver of the job offer requirement, it is not necessary for her to have a job offer from a specific employer. However, we will consider information about her current and prospective positions to illustrate the capacity in which she intends to work in order to determine whether her proposed endeavor meets the requirements of the *Dhanasar* analytical framework.

on motion and that have not been previously submitted in the proceeding, which includes the original petition. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts."

On motion to reopen, the Petitioner submits the following evidence:

- A letter from [redacted], the associate professor and chair of [redacted] University's Department of History of Art and Architecture, dated February 2020;
- A letter from [redacted] president of the [redacted] College, dated February 2020;
- An excerpt from a document titled "[redacted]" previously submitted on appeal;
- An undated document titled "[redacted]";
- An excerpt from a document titled "[redacted]" dated May 2005; and
- A document titled "[redacted]" dated December 2006;

On motion, the Petitioner asserts that "the national importance of [her] work is evident from the fact that she is routinely sought after to speak at conferences and university speaking engagements," referencing the two letters as examples. The one-page letter from [redacted] asserts that he invited the Petitioner "to present a public lecture on 24 October 2018," and he discusses the event. However, a petitioner must establish eligibility at the time of filing. 8 C.F.R. § 103.2(b)(1). Because the event described by [redacted] occurred after the petition filing date in 2017—and, moreover, after the Director's initial decision in 2018—it does not establish eligibility at the time of filing. *Id.*

Additionally, as summarized above, at the time of filing the proposed endeavor did not include speaking at conferences and university speaking engagements. However, in support of the Petitioner's prior motion on the Director's decision, she submitted evidence that she would "speak about employing historic [redacted] forms in her architectural design practice in [redacted], at [redacted] University on October 24, 2018. Therefore, the fact that the Petitioner lectured at [redacted] University in October 2018 is not new for the purposes of the motion on our appeal decision, because that information was previously submitted in the proceeding. Accordingly, to the extent that the Petitioner asserts that her work is nationally important because she speaks about it at conferences and universities, we need not consider that fact as it is not new.[2]

[2] In contrast, to the extent that the Petitioner asserts that her speaking engagements at conferences and universities are part of her proposed endeavor, that presents a set of facts that did not exist at the time of filing. A visa petition may not be approved after a petitioner or beneficiary becomes eligible under a new set of facts. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to U.S. Citizenship and Immigration Services (USCIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Because, at the time of filing, the proposed endeavor did not include speaking engagements at conferences and universities, the fact that the Petitioner speaks at conferences and universities cannot establish eligibility as part of the proposed endeavor.

Furthermore, the subject of the Petitioner's speaking engagement, "about employing historic [redacted] forms in her architectural design practice in [redacted]" does not address the aspects of the proposed endeavor, summarized above. Therefore, even to the extent that we may consider the event described by [redacted] the event is attenuated from the work the Petitioner would perform as part of the proposed endeavor in the United States. Instead, the event appears to describe interest in the Petitioner's past, and her prior work abroad.

The two-page letter from [redacted] states that "on Wednesday, March 6, 2019, we were proud to host [the Petitioner], who gave a PowerPoint-enhanced lecture in our [c]onference [h]all, entitled: [redacted]" and he describes the event. However, similar to the event discussed in the letter from [redacted] the event described by [redacted] occurred after the petition filing date in 2017 and after the initial decision in 2018. Therefore, it does not establish eligibility at the time of filing.

The Petitioner submitted the next document listed above, regarding the [redacted], on appeal. Because the document was already in the record, it does not present a new fact on motion. Moreover, the document addresses work "undertaken December 2018," after both the petition filing date in 2017 and the date of the Director's decision. Therefore, similar to the letters from [redacted] and [redacted] the [redacted] documentation does not establish eligibility at the time of filing.[3] 8 C.F.R. § 103.2(b)(1).

On appeal, the Petitioner asserts that the [redacted] refurbishment "has cultural significance for people in the U.S. in general, and particularly the [redacted] area and its suburbs, since the center hosts many events, inviting visiting speakers and exhibitions, and the work is thus in the national interest." The [redacted] document submitted on motion contains 21 pages of photographs depicting the [redacted]. The document is undated; however, we note that in the brief dated November 2018, submitted in support of the combined motion on the Director's initial denial, the Petitioner asserted that she "has been responsible for the refurbishment of community center facilities" at the [redacted] Therefore, that the Petitioner refurbished the [redacted] facilities is not a new fact in support of the motion on our appeal dismissal. Furthermore, although the photographs depict the [redacted] the Petitioner does not elaborate on how the photographs demonstrate that the proposed endeavor is of national importance.

We first note that the next document, [redacted], is an excerpt.[4] On motion, the Petitioner asserts that the [redacted] document states, "[t]he United States Department of Housing and Urban Development is committed to meeting the unique housing needs of the citizens of the 'colonias,' those rural communities and neighborhoods located close to the U.S.-

[3] We acknowledged in our appeal decision that "the Petitioner's proposed remodeling and preservation consulting work for . . [redacted] has substantial merit," as part of the endeavor to be performed after the petition filing date. However, documentation of work performed after the petition filing date may not establish eligibility as of the petition filing date, as required by 8 C.F.R. § 103.2(b)(1). Moreover, because the work "undertaken December 2018" occurred after the Director's decision, it may not establish continuing eligibility through adjudication. Rather, our consideration of the [redacted] project is of the proposal of the work to be performed, as articulated the time of filing, not of the work actually performed after the time of filing.

[4] The document in the record appears to be the first 10 pages of a document consisting of at least 111 pages.

Mexico border that lack adequate infrastructure and other basic services."[5] The Petitioner also asserts that the document indicates that "the U.S. Federal Government is committed to instituting policies and procedures for exactly the type of work [the Petitioner] is hoping to continue, thus establishing the national importance of her work." However, the Petitioner does not establish on motion how the document, dated 2005, specifically addresses the proposed endeavor and presents a new fact about the national importance of the Petitioner's proposed endeavor, as articulated in her 2017 petition.

Next, the [redacted] document discusses traditional crafts in [redacted], a craft economy in [redacted] and provides information about [redacted] However, similar to the [redacted] document, the Petitioner does not establish on motion how the [redacted] document, dated 2006, specifically addresses the proposed endeavor and presents a new fact about the national importance of the Petitioner's proposed endeavor, as articulated in her 2017 petition.

In the motion brief, the Petitioner also lists 24 examples of "work which she has generated for many U.S. individuals as artists, artisans, small manufacturers and larger companies, [which has] brought economic benefits, as per the standard of national importance." The Petitioner also lists 11 examples of "cultural contributions set forth by [her] past work . . ., specifically for [redacted] Food and [redacted]" in the area of [redacted], Illinois. Neither list provides the dates on which the Petitioner generated work for artists, artisans, and manufacturers, or made cultural contributions. Although evidence of the Petitioner's past work is material to the second *Dhanasar* prong, it does not address the national importance of the proposed endeavor.

In summation, the Petitioner has not presented on motion a new fact that may establish eligibility under the first *Dhanasar* prong.

B. Motion to Reconsider

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We do not consider new facts or evidence in a motion to reconsider.

The Petitioner does not specifically assert on appeal that our decision was based on an incorrect application of *Dhanasar*, based on the evidence in the record of proceedings at the time of the decision.[6] Instead, the Petitioner generally requests us to reach a different conclusion based on the evidence discussed above, in the context of a motion to reopen. We affirm that our decision correctly applied *Dhanasar*, and that it was correct, based on the evidence in the record at the time of the decision.

[5] This assertion is the beginning of the document's foreword.

[6] The Petitioner asserts in the motion before us that "USCIS has erred in its decision of [the Petitioner's] petition and that a waiver of the requirements of a labor certification is warranted." In contrast, in support of the prior motion on the Director's decision, the Petitioner specifically asserted, "the Service incorrectly applied the standard for national importance set forth in *Matter of Dhanasar*."

On motion, the Petitioner asserts that "Section 101(d)(2) of the National Historic Preservation Act [(NHPA)], 16 U.S.C. § 470a, et seq. . . . specifically requires the Federal Government to establish a program to assist [redacted] in preserving their particular historic properties." The Petitioner further asserts that "[t]he fact that there is extensive Congressional law specific to the work [the Petitioner] is conducting indisputably establishes its national importance." The existence of federal statutes (such as the NHPA) and other U.S. government programs relating to assisting [redacted] does not automatically render the work of an individual architect or preservationist nationally important under the *Dhanasar* framework. Moreover, the motion does not identify any section of the NHPA that mandates a finding that Petitioner's proposed endeavor has national importance. As such, the Petitioner has not shown that our decision contained an incorrect application of law or policy.

In summation, the Petitioner has not established on motion that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. Because we limited our appeal decision to an analysis of the first *Dhanasar* prong, and because our conclusion on that issue is dispositive, we need not address the Petitioner's assertions on motion regarding the second and third prongs of the *Dhanasar* framework.

III. CONCLUSION

As the Petitioner has not met the requirements for a motion to reopen or a motion to reconsider, we affirm our prior conclusion that the Petitioner has not established eligibility for, or otherwise merits, a national interest waiver as a matter of discretion.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.